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LAW OFFICES

KELLER AND HECKMAN LLP

1001 G STREET, N.W.
SUITE 500 WEST
WASHINGTON, D.C. 20001
TELEPHONE (202) 434-4100
FACSIMILE (202) 434-4646

BOULEVARD LOUIS SCHMIDT 87
B-1040 BRUSSELS
TELEPHONE 32(2) 732 52 80
FACSIMILE 32(2) 732 53 92

JOSEPH E. KELLER (1907-1994)
JEROME H. HECKMAN
WILLIAM H. BORGHESANI, JR.
MALCOLM D. MacARTHUR
WAYNE V. BLACK
TERRENCE D. JONES
MARTIN W. BERCOVICI
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PAULA DEZAS*
JOHNIE W. HOPKINS, JR.*
SUSAN L. CHENAULT*
JOHN B. O'LOUGHLIN, JR.*

*NOT ADMITTED IN D.C.
◇RESIDENT BRUSSELS

SCIENTIFIC STAFF

DANIEL S. DIXLER, PH. D.
CHARLES V. BREDER, PH. D.
ROBERT A. MATHEWS, PH. D., D.A.B.T.
JOHN P. MODDERMAN, PH. D.
HOLLY HUTMIRE FOLEY
JUSTIN C. POWELL, PH. D.
JANETTE HOUK, PH. D.
LESTER BORODINSKY, PH. D.
THOMAS C. BROWN◇
MICHAEL T. FLOOD, PH. D.
ANDREW P. JOVANOVICH, PH. D.
EUGENIA M. BRAZWELL, PH. D.

TELECOMMUNICATIONS ENGINEER
RANDALL D. YOUNG

WRITER'S DIRECT DIAL NUMBER

October 11, 1996

(202) 434-4180

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Room 222
Washington, D.C. 20554

RECEIVED
OCT 11 1996
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Re: Ex Parte Presentation - Detariffing
CC Docket: 96-61

Dear Mr. Caton:

Yesterday, on behalf of the American Petroleum Institute, I met with James Casserly, Senior Legal Advisor to Commissioner Susan Ness, to discuss API's position in the above cited proceeding. The attached material was discussed in the meeting.

Two (2) copies of this letter along with the attachments are being submitted to the Secretary of the FCC in accordance with Section 1.1206(a)(1) of the Commission's rules.

Sincerely,

C. Douglas Jarrett

C. Douglas Jarrett

Attachment

cc: J. Casserly

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List A B C D E

Position of the American Petroleum Institute

CC Docket No. 96-61
October 10, 1996

I. COMMISSION SHOULD ADOPT A MANDATORY DETARIFFING POLICY FOR MULTIYEAR SERVICE ARRANGEMENTS.

A. POLICY REASONS

- Tariffs promote the interests of carriers in a competitive environment, not users.
- Users are frustrated with ability of carriers to "hide behind tariffs."
- Terms and conditions of multiyear service arrangements, particularly negotiated arrangements, can and should be consolidated into a single document.
  - Mandatory detariffing is appropriate policy.
  - Transaction costs and uncertainty for users will decrease significantly.

B. MANDATORY DETARIFFING IS CONTEMPLATED BY SECTION 10(a)

- The argument against mandatory detariffing is an overly narrow interpretation of Section 10(a).
- Adoption of the carrier position that forebear means to "refrain from action" preserves the carrier's discretion to decide when and whether to file tariffs.
- Surely Congress did not intend Section 10(a) to allow carriers to invoke the benefits regulation as the Commission "deregulates."

In an analogous context, National Small Shipments Traffic Conference, Inc. v. CAB, 618 F.2d 819, 835 (D.C. Cir. 1980), where Congress had granted the regulator authority to discontinue traditional regulatory (tariffing), the court rejected the carriers' attempt to preserve the legal benefits accruing to carriers inherent in a permissive detariffing policy, stating:

> [t]he amendments were designed to reduce [Civil Aeronautics] Board regulation . . . and promote competition not to grant carriers a statutory right to apply for board approval . . . . The Board's attempt to further reduce the amount of regulation through the use of its broad exemption powers is quite consistent with Congress' purpose.

Id. At 835. Congress' intent in Section 10(a) was to provide the Commission authority to carry out the deregulatory objectives of the 1996 Act, not shifting authority to carriers.

C. PERMISSIVE DE-TARIFFING DOES NOT RESOLVE THE FILED RATE DOCTRINE.

1. PERMISSIVE DE-TARIFFING DOES NOT PROVIDE COMMERCIAL STABILITY WHICH IS UNOBTAINABLE IN A TARIFFED ENVIRONMENT.

- The filed rate doctrine can still be invoked by carriers to undermine negotiated agreements by the filing of a superseding tariff.

- Permissive detariffing as pressed by the carriers preserves the carrier's discretion to unilaterally amend negotiated arrangements, particularly where service providers are regulated as nondominant carriers. This is adverse to the interests of all users.

2. DESPITE AT&T'S URGING IN ITS COMMENTS AND *EX PARTE* FILING OF SEPTEMBER 27, 1996, THERE IS NO LEGAL PRECEDENT FOR THE POSITION THAT INDEMNIFYING LANGUAGE IN A CONTRACT CANNOT BE SUPERSEDED BY A SUBSEQUENT TARIFF FILING.

The cases cited in AT&T's *ex parte* presentation of September 27, 1996 simply do not support its theory that the courts are willing to find contractual language controlling when tariffs are subsequently filed. AT&T's principal authority for this proposition, Arkansas Louisiana Gas Co. V. Hall, the Supreme Court unequivocally held that "when there is a conflict between the filed rate and the contract rate, the filed rate controls."[1] Nonetheless, AT&T strains the limits of credibility to argue that the Court "suggests that [a] negotiated rate could prevail . . . "[2] This notion is premised on an excerpt from a portion of the opinion that actually reinforces the strictness of the filed rate doctrine. In its entirety, the passage reads:

> Except when the Commission permits a waiver, no regulated seller of natural gas may collect a rate other than the one filed with the commission. These straightforward principles underlie the "filed rate doctrine," which forbids a

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[1] Arkansas Louisiana Gas Co. V. Hall, 101 S.Ct. 2925, 2933 (1981).

[2] AT&T *Ex Parte* Presentation (September 27, 1996), Footnote 2.

> regulated entity to charge rates for its services other than those properly filed with the appropriate federal regulatory authority.[3]

The Supreme Court's ultimate holding and provides little support for AT&T's position.

II. CPE BUNDLING PROHIBITION SHOULD BE LIFTED.

- Current policy has outlived its usefulness.
- New policy of permissive, optional bundling of CPE and services is far more in line with current requirements of large users.
- Integrated offerings of service and equipment may be critical in the commercialization of advanced technologies.
  - Promote innovative end to end solutions.
  - Customers and carriers interested in testing or demonstrating new technologies will be handcuffed.

[3] Arkansas Louisiana Gas Co. v. Hall, 101 S.Ct. 2925 (1981).